RHB BANK BHD

v.

OILANGAS SHIPPING SERVICES (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KL REKHRAJ J
[WINDING-UP COMPANIES NO: D6-28-516-1998]
20 NOVEMBER 1998

COMPANY LAW: *Winding-up - Settlement - Withdrawal of petition - Liberty to file afresh only with leave of court - Whether court could grant conditions upon withdrawal - Whether petitioner should be allowed to revive petition at will*

The petitioner filed a petition against the respondent after the respondent failed to comply with the statutory notice under s. 218(a) of the Companies Act 1965 claiming a sum of RM543,974.12 due to the petitioner under a judgment of the High Court in Kuala Lumpur. The respondent proceeded to file a notice of intention to oppose the petition and at the hearing of the petition, the petitioner asked for an adjournment to enable it to put an affidavit-in-reply. At the adjourned hearing, the petitioner informed the court of an agreement entered between the parties arriving at a settlement. The petitioner then sought leave of the court to withdraw the proceedings with liberty to file afresh. The court granted the leave to withdraw but without liberty to file afresh except with the prior leave of the court first had and obtained. Hence, the instant appeal by the petitioner against that part of the order of the court refusing them liberty to file afresh except with leave of the court.

Held:

[1] Winding-up is a drastic weapon available to a creditor under s. 217(1)(b) of the Companies Act 1965. The court must proceed expeditiously in its disposal as the delay not only paralyses the companies management in its continuity but puts the banks of the respondent in a bind under s. 223 of the Act in its disposition of the company's funds; and/or a prohibition on the execution of proceeding, if any, on hold against the company because the winding-up order relates back to the date of presentation of the petition.

[2] The petitioner was at its absolute liberty under s. 221 of the Act, either to proceed or discontinue the petition by withdrawing the same with the leave of the court. However, the court in granting such withdrawal could

place conditions to prevent an abuse of the process of court in their re-filing *de novo*; an exercise to frustrate the due process of court in clearing its long back-log of cases.

[3] Once the papers were in order, the petitioner should be put to the only option to either proceed head on to wind-up, or at its choice withdraw with no liberty. This was because by then the act/or the presumption of being unable to pay the debt had been activated against the company, and the petitioner must not be allowed to do so, in a way as would leave it free to revive the petition at will (*Re Sailport Pty. Ltd*). For those reasons, leave to discontinue was made conditionally, subject to the obtaining of the leave of the court.

[Order accordingly.]

Case referred to:
Re Sailport Pty Ltd [1990] 8 ACLC 400 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 217(1)(b), 218(a), 221

For the petitioner - TM Eng; M/s Shook Lin & Bok
For the respondent - S Bhavani; M/s Lawrence & Co

Reported by Usha Thiagarajah

JUDGMENT

KL Rekhraj J:

The petitioners filed a petition on 20 July 1998 against the respondent after the respondent had failed and or neglected to comply with the statutory notice under s. 218(a) of the Companies Act 1965 claiming a sum of RM543,974.12 being the amount due to the petitioner under a judgment of the High Court Kuala Lumpur dated 28 November 1996; together with fixed continuing interest charged at the rate of 2.5 per cent per annum above the effective costs of funds from 1st September 1994, to the date of final payment; and together with further interest at the rate of one per cent annum on the total unpaid final payment.

The petition was fixed for hearing on 24 September 1998; and the respondents proceeded to file a notice of intention to oppose the petition; supported by an affidavit affirmed by Mohsein bin Mokhtar – the manager of the respondent company.

At the hearing of the petition; the petitioner's solicitors asked for an adjournment to enable them to put an affidavit in reply; and the court adjourned the hearing to 15 October 1998.

At the adjourned hearing, the petitioner's solicitors informed the court of an agreement that has been entered between the parties; arriving at a settlement; and seeking leave of the court to withdraw the proceedings, with liberty to file afresh.

The court granted leave to withdraw but without liberty except with the prior leave of the court first had and obtained; and the petitioners now being dissatisfied, appeal against that part of the order, refusing them the liberty.

Winding-up is a drastic weapon available to a creditor under s. 217(1)(b) of the Companies Act 1965 and the court, must proceed expeditiously in its disposal; as the delay not only paralyses the companies management in its continuity, but puts the banks of the respondent in a bind under s. 223 of the Act – in its disposition of the company's funds; and/or a prohibition on the execution of proceeding if any, on hold against the company; because the winding-up order relates back to the date of the presentation of the petition.

The petitioners were at their absolute liberty under s. 221 of the Companies Act; either to proceed **or** discontinue the petition by withdrawing the same with the leave of the court; but the court in granting such withdrawal could place conditions to prevent an abuse of the process of court in their re-filing *de-nove*; an exercise to frustrate the due process of court in clearing its long back-log of cases.

I am of the view that once the papers are in order; the petitioners should be put to the only option to either proceed head on to wind-up; or at their choice withdraw – with no liberty; because by then the act/or the presumption of being unable to pay the debt, has been activated against the company; and the petitioners must not then be allowed to do so, in a way as would leave them free to revive the petition at will (*Re Sailport Pty. Ltd.* [1990] 8 ACLC 400). For that reasons, leave to discontinue was made conditionally, subject to the obtaining of the leave of the court.